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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JOSE ARTURO GONZALEZ, Defendant and Appellant.	A151017 (Napa County Super. Ct. No. CR181686)

Defendant Jose Arturo Gonzalez was charged in an eight-count information with several felony offenses—stalking (Pen. Code, § 646.9, subd. (a); count 1),[1] making criminal threats (§ 422; counts 2, 3, 4, 5), dissuading a witness from reporting a crime (§ 136.1, subd. (b)(1); count 6), and resisting an executive officer (§ 69; count 7)—and one misdemeanor offense of disorderly conduct by distributing a private intimate image (§ 647, subd. (j)(4); count 8).[2] After a five-day jury trial, defendant was convicted of stalking, one count of making a criminal threat (count 5), dissuading a witness from reporting a crime, and disorderly conduct by distributing a private intimate image.

Defendant now appeals, limiting his challenge to his conviction of count 5, making a criminal threat. He contends that his conviction of this count must be reversed because the prosecution failed to present sufficient evidence of his intent to threaten the victim, Jane Doe, with death or great bodily injury as required under section 422. Having

[1] All statutory references are to the Penal Code.

[2] The information further alleged that defendant had suffered a prior strike conviction as described in section 667.

considered defendant's contention in light of the evidence presented at trial, we find his contention unavailing. Accordingly, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On December 22, 2016, the District Attorney of the County of Napa charged defendant Jose Arturo Gonzalez with several felony and misdemeanor offenses, including making criminal threats against his former romantic partner, Jane Doe. Defendant entered pleas of not guilty to all counts, and the matter was tried before a jury in February 2017.

During the trial, the prosecution presented testimony from Doe, several police officers present at the time defendant was arrested for the charged offenses, and several other witnesses.[3] In order to resolve this appeal, we need only recount Doe's trial testimony. Doe testified that she and defendant met while attending high school together in Napa County. They lost touch after high school. Sometime in January 2015, approximately 20 years after their initial meeting, they became reacquainted at a gathering held at Doe's brother's home. Doe and defendant began "hanging out" for a short period, and then became romantically involved. According to Doe, the first few months of the relationship were "normal and great," and the couple recorded several videos of their sexual relationship.

In August 2015, defendant lost his job, and their relationship began to change. Doe characterized their relationship in the months that ensued after defendant lost his job as "hit and miss." According to her, "Sometimes we'd see each other, sometimes we wouldn't." She continued to date defendant through the summer of 2016.

In July 2016, Doe and defendant "got into a big fight . . . ." When asked to describe the reason for the fight, Doe testified that defendant's inability to keep a job and his use of drugs indicated that he "was just backtracking to the old ways . . . ." She felt that she "deserved better," and she told defendant that she was "end[ing] things."

[3] Defendant did not call any witnesses but did offer several exhibits that were admitted into evidence by the trial court.

Defendant continued to contact Doe and "wouldn't leave [her] alone." For example, defendant continued to telephone Doe and came to her workplace several times in July. Defendant also sent her text messages, repeatedly called her and would yell into the phone. Defendant found a job in August, and the couple reconciled for a brief period.[4] Doe and defendant continued to see each other through the end of October, when she broke up with him.

Defendant then began to send Doe repeated text messages expressing his disappointment in her decision to end the relationship. In several of his text messages, defendant implored Doe to respond to his calls and accused her of sleeping with other men. On one occasion, when Doe failed to answer defendant's call, he left a voice mail message in which he accused Doe of being "cruel"—stating, "[Y]ou need to talk to me or I'm gonna do bad things . . . . I'm going to go to your work, . . . to your house, humiliate you, pictures, videos . . . ."[5]

Thereafter, although uninvited, defendant appeared at Doe's residence on several occasions during November. Doe, who lived with her parents, described an occasion when she came home from work and observed defendant parked across the street from her house. She got out of her car and told defendant, "[Y]ou need to leave. I didn't invite you here." On another occasion, as she was in her car one morning getting ready to drive to work, she observed defendant sitting in his car parked across the street. Defendant rolled down his car window and asked to speak to her. She locked her car door, called her father, and asked him to call the police because she was afraid of defendant. Defendant got out of his car and approached her, "screaming and yelling, I

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[4] Doe testified that around this time she "dropped that initial restraining order[.]" The record provides no detail regarding the facts proffered in support of the order or any indication of the superior court in which Doe sought relief. We presume it was from the Napa County Superior Court, but in any event, the lack of detail surrounding the issuance of this order is not material to the resolution of this appeal.

[5] During her testimony, Doe authenticated approximately 96 pages of text messages she exchanged with defendant. These text messages were marked as the People's exhibit 2 and admitted in evidence bearing the same designation.

need to talk to her . . . ." As defendant approached Doe's car, her father—now outside of their house—positioned himself between defendant and Doe's car. Doe's father told defendant to stay away from his daughter and that the police were on the way. Doe testified that defendant came to her home, without invitation, at least five times during the month of November.

Defendant also sent Doe text messages during the month of November. In some of these text messages, he expressed his love for her. However, these text messages also contained foul language and referred to her as "a fucking whore" and "a bitch," and stated, "I can't believe you're doing this to me." Doe asked defendant to leave her alone because she was afraid of him.

Around this same time, defendant sent Doe links to videos on YouTube of them having sex. Doe clicked on one of the links and observed at least five videos of them having sex. Later, defendant sent a text message to Doe claiming he had not uploaded the videos but threatened to post the videos on social media sites ("Facebook and . . . Twitter and Instagram") and to send nude pictures of her to her work, her family, her friends, her church, and her mother's work unless she fixed things between them. Doe called defendant and asked him to take the videos down.

On November 16 or 18, Doe sought and obtained a restraining order to prevent defendant from contacting her.[6] However, Doe was unable to serve the order on defendant, and he continued to send her text messages.

Doe also testified regarding several messages defendant sent to her on November 20 and 21. According to her, these messages reflected instances of defendant's increased hostility toward her. On November 20, defendant sent her three messages that formed the bases for counts 2, 3, and 4—making criminal threats—of which defendant was acquitted. In one message, he stated, "Hello, you dead bitch." In a second message, he stated, "I want your soul so I can eat it and shit it out." In a third message, he stated, "I hope you hate me as much as I hate you for putting with shit, you

[6] See footnote 4, *ante*, page 3.

better hope you'll see me around because it's bite your fucking nose off just to make you cuter, make me cry like a little bitch." (*Sic.*) Doe perceived these messages as threats and became "scared and very paranoid." As a result of defendant's conduct, she instituted precautionary measures when out in public to avoid contact with defendant.

On November 21, defendant sent her messages that formed the basis for count 5—making a criminal threat—of which he was convicted. In his first message, defendant stated, "Oh fuck it, I'm going to go to your fucking house. Come outside and talk to me, don't give me no scared bullshit and don't act like you're scared." In his second message, he stated, "Get ready, I'm taking you to Texas, I'm going to kidnap you and we're leaving and not coming back." Doe testified that she was scared when she received these messages and she took them "as a threat[.]" When asked why she perceived the messages as a threat, she explained, "It makes me feel scared, it makes me feel paranoid, the fact that he would want to take me against my own will."

The next day, Doe contacted the Napa Police Department to obtain assistance in serving defendant with the restraining order. The police instructed her to contact defendant and set up a time to meet him the following day at Round Table Pizza in Napa. When defendant arrived at Round Table Pizza for the meeting, he was arrested by Napa police officers.

The prosecution presented the testimony of several other witnesses before resting. Defendant moved under section 1118.1 to dismiss counts 2 through 5 and count 8. Defendant argued, in seeking dismissal of counts 2 through 5, that the text message and e-mail evidence relied upon by the prosecution failed to establish that defendant had threatened Doe with death or bodily injury as required under section 422. The trial court denied the motion. Defendant then rested without presenting any additional evidence.

The jury then heard the trial court's instructions of law and the closing arguments of counsel and began deliberations. After deliberating for approximately two days, the jury convicted defendant of counts 1, 5, 6, and 8 as alleged in the information (stalking, making a criminal threat, dissuading a witness from reporting a crime, and disorderly conduct by distributing a private intimate image) while acquitting him of the remaining

charges. At sentencing, the court denied defendant's request for a grant of probation and sentenced him to a consecutive sentence of four years eight months in prison. Defendant filed a timely appeal on April 6, 2017.

DISCUSSION

Defendant seeks reversal of his conviction of count 5. He asserts that the prosecution failed to present sufficient evidence that his November 21 threat to kidnap Doe was likely to produce death or great bodily injury as required by section 422. For the reasons explained below, we find defendant's contention lacks merit.

Before turning to the merits of defendant's appeal, we first address the threshold issue of the appropriate standard of review in this appeal. Defendant contends that our review, in part, is governed by the independent standard of review—given the First Amendment interests implicated in the communication which supports count 5.

Conversely, the People maintain that the threat at issue—kidnapping—does not constitute protected speech under the First Amendment because defendant's threat was a threat of unlawful violence. Thus, the People contend that this court need not engage in a determination of whether the speech at issue in count 5 impinges upon defendant's right of free speech under the First Amendment.

Our resolution of this issue is guided by well-settled principles of law. Where First Amendment interests are implicated in determining whether speech is punishable as a threat under section 422, "appellate court[s have] an obligation to 'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.' " (*Bose Corp. v. Consumers Union of U. S., Inc.* (1984) 466 U.S. 485, 499.) Our Supreme Court has held that "a reviewing court should make an independent examination of the record in a section 422 case when a defendant raises a *plausible* First Amendment defense to ensure that a speaker's free speech rights have not been infringed by a trier of fact's determination that the communication at issue constitutes a criminal threat." (*In re George T.* (2004) 33 Cal.4th 620, 632, italics added (*George T.*).) As our high court stated in *George T.*, a plausible First Amendment defense requires that the words at issue

and their surrounding circumstances exhibit, on their face, the hallmarks of protected speech, such as advancing creative expression, dialogue, the expression of emotions or feelings, persuasion, or the exchange of ideas. (*Id.* at p. 635.)

The independent review standard "entails an examination of the ' " ' statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment . . . protect.' " ' " (*George T., supra*, 33 Cal.4th at p. 631.) "Independent review . . . 'assigns to judges a constitutional responsibility that cannot be delegated to the trier of fact, whether the factfinding function be performed in the particular case by a jury or by a trial judge' . . . ." (*Id.* at pp. 631–632.) Independent review, however, "is not the equivalent of de novo review 'in which a reviewing court makes an original appraisal of all the evidence to decide whether or not it believes' the outcome should have been different. [Citation.] Because the trier of fact is in a superior position to observe the demeanor of witnesses, credibility determinations are not subject to independent review, nor are findings of fact that are not relevant to the First Amendment issue." (*Id.* at p. 634.)

"When the First Amendment is not implicated, [a] sufficiency of the evidence challenge is evaluated under the substantial evidence test. [Citations.] 'In assessing the sufficiency of the evidence, we review the entire record in the light most favorable to the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] Reversal on this ground is unwarranted unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction]." [Citation.]' " (*People v. Wilson* (2010) 186 Cal.App.4th 789, 805, first bracketed insertion added.) The standard is one that ultimately gives great deference to the trier of fact despite possible alternative rationales. " 'If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also be reasonably reconciled with a contrary finding does not warrant a reversal of the judgment.' " (*People v. Hillery* (1965) 62 Cal.2d 692, 702.)

Turning back to the issue of the applicable standard of review in this appeal, we first note that defendant failed to raise a plausible First Amendment defense during the trial of this matter. Nor does defendant cite to any portion of the record where the defense was raised. On the contrary, the record reflects that defense counsel conceded that the November 21 communication was "a threat" but argued that the communication was not a threat of great bodily injury and Doe did not perceive it as such. For example, during defense counsel's cross-examination of Doe, counsel focused largely on whether or not the jury could believe Doe's testimony that she felt threatened by defendant, given her response to his conduct, to wit: Doe purposely deleted positive text messages she exchanged with defendant and messages she sent defendant during the period she purportedly feared defendant. She also threatened to distribute a private image of defendant's genitalia. She knew how to block someone's phone number (including defendant's) on her phone but did not block defendant's number. Similarly, in his closing summation, counsel agreed that the November 21 threat to kidnap Doe was indeed a threat but argued that the pertinent language did not convey a threat of death or great bodily injury as required under section 422.

As defendant's counsel explained: "And then we have *I'm going to kidnap you*, which is a threat. Definitely. I'm gonna kidnap you, that's definitely a threat. Is it a threat of death or significant injury? Is it reasonable to assume that he's going to say I'm gonna kidnap you and take you to Texas? That he's gonna kill her and just take the body or was he just going to take her as a person to Texas? It's a threat of kidnapping, certainly, but you need to find a threat of death or significant substantial injury. He's threatening to take her, not hurt her. And while this sounds like a technicality, it's not. That's the law." Thus, as the record reflects, defendant effectively waived the argument he now makes in this appeal.

We find defendant's contention that the independent standard of review applies here dubious for yet another reason. The text message at issue in count 5, defendant's threat to kidnap Doe and prevent her from ever returning to her home, is not protected speech under the First Amendment. Defendant's text message conveyed a clear and

unambiguous threat to kidnap Doe. Defendant fails to articulate how the facts and circumstances that occasion his threat transmute his expression into speech protected by the First Amendment. (See *Virginia v. Black* (2003) 538 U.S. 343, 359 [" 'True threats' encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals"]; *People v. Wilson*, *supra*, 186 Cal.App.4th at p. 804 [" ' " 'When a reasonable person would foresee that the context and import of the words will cause the listener to believe he or she will be subjected to physical violence, the threat falls outside First Amendment protection" ' "].) Here, the text messages sent by defendant to Doe in the days before his November 21 threat to kidnap her reflect a steady and escalating pattern of threats involving physical harm to her.[7]

Defendant also cites *George T.* in support of his contention that the independent standard of review applies here. We disagree. In *George T.*, the defendant, a minor, showed several students a poem he had written, the last lines of which read, "I / slap on my face of happiness but / inside I am evil!! For I can be / the next kid to bring guns to / kill students at school. So parents / watch your children cuz I'm BACK!!" (*George T.*, *supra*, 33 Cal.4th at pp. 624–626.) Noting that "[a]s a medium of expression, a poem is inherently ambiguous," and finding a lack of incriminating circumstances—such as a "history of animosity or conflict between the students"—surrounding the poem's dissemination (*id.* at pp. 636–637), the Supreme Court applied the independent standard of review and reversed the minor's conviction (*id.* at pp. 630, 634). The high court concluded that the circumstances surrounding the poem's dissemination were not

[7] As noted, defendant was acquitted of counts 2, 3, and 4—making criminal threats based on the three messages he sent to Doe on November 20. Nevertheless, these and other messages defendant sent to Doe in the days before he threatened to kidnap her on November 21 show the circumstances in which the threat to kidnap was made, and are therefore relevant to our resolution of defendant's challenge of his conviction of count 5. (§ 422, subd. (a) [the defendant's threat must, "on its face and *under the circumstances in which it is made*," be so unequivocal as to convey to the person being threatened "a gravity of purpose and an immediate prospect of execution of the threat. . . ."].)

sufficient to establish that it was a criminal threat in violation of section 422. (*Id.* at p. 638.) Here, unlike in *George T.*, the words and circumstances attendant to defendant's text message do not exhibit on their face the type of speech protected under the First Amendment. Defendant's text message was an unambiguous threat to kidnap Doe and to prevent her from ever returning home. In addition, the circumstances attendant to defendant's threat involve defendant's repeated and unwelcomed visits to Doe's residence along with several text messages which reflect an escalating pattern of statements evidencing an intent to physically harm her. Moreover, after defendant threatened to kidnap her, he sent her another text message warning her, "No cops, because they're gonna have to shoot me." Simply put, defendant's threat to kidnap Doe was unequivocal, and the circumstances surrounding his threat involved threats of bodily harm. We fail to see how G*eorge T.* supports defendant's contention that the independent standard of review applies here.

In any event, even applying the independent standard of review, we would affirm. To establish a conviction of making a criminal threat, the prosecution must prove the following five elements: " '(1) that the defendant "willfully threaten[ed] to commit a crime which will result in death or great bodily injury to another person," (2) that the defendant made the threat "with the specific intent that the statement . . . is to be taken as a threat, even if there is no intent of actually carrying it out," (3) that the threat—which may be "made verbally, in writing, or by means of an electronic communication device"—was "on its face and under the circumstances in which it [was] made, . . . so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat," (4) that the threat actually caused the person threatened "to be in sustained fear for his or her own safety or for his or her immediate family's safety," and (5) that the threatened person's fear was "reasonabl[e]" under the circumstances.' " (*George T.*, *supra*, 33 Cal.4th at p. 630, quoting *People v. Toledo* (2001) 26 Cal.4th 221, 227–228.)

Defendant argues that the record fails to reflect sufficient evidence to establish the first of these required elements. He argues that the crime of "simple kidnapping" does

not necessarily result in death or great bodily injury and that no threat of injury or death was expressed in defendant's text message stating he was going to kidnap Doe and take her to Texas.[8]

Defendant's contention suffers from several flaws—not the least of which is that his argument focuses on the crime of kidnapping in the abstract, divorced from the circumstances surrounding his threat to kidnap Doe. First, as defendant readily acknowledges, the crime of kidnapping is inherently a crime of violence as the use of force or fear is necessary to complete the crime. On its face, defendant's statement expressly advocates the use of force to kidnap Doe and in his assertion he would never let her return. Defendant's threat to kidnap Doe, when considered in light of the circumstances attendant to its issuance, clearly establishes that defendant's threat involved the risk of substantial physical injury to Doe. For example, one of defendant's November 21 text messages referred to Doe as "you dead bitch." In other messages sent the same day, defendant stated, "I want your soul so I can eat it and shit it out," and "I hope you hate me as much as I hate you for putting with shit, you better hope you'll see me around because it's bite your fucking nose off just to make you cuter, make me cry like a little bitch." (*Sic*.) Defendant's repeated visits to Doe's home, his demonstrated history of erratic and menacing behavior toward her, and his escalating threats of physical harm in text messages forwarded to her just days prior to his threat to kidnap her and prevent her from ever returning home provide substantial evidence to support the jury's finding that defendant's threat to kidnap and prevent her from returning home was a threat which involved substantial physical injury or great bodily harm.

Nevertheless, defendant contends that the act of kidnapping, although designated a serious and violent crime, can also be committed through nonviolent means, e.g., merely transporting someone in a car against his or her will, or moving someone without violence, through vague threat, or use of mild force, all of which fall below the threshold

[8] The jury was instructed, in part, "*Great bodily injury* means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm."

of fear of death or great bodily injury. Defendant maintains that the threat to kidnap Doe literally and in context amounted to no more than "a romantic longing; there was no evidence [defendant] intended the threat to convey the prospect of death or great bodily injury, or that Doe perceived such a prospect in it." Nonsense. While defendant posits alternative explanations for his conduct, at bottom, defendant asks this court to reweigh the jury's factual findings. Because the trier of fact is in a superior position to observe the demeanor of witnesses, credibility determinations are not subject to independent review, nor are the findings of fact that are not relevant to the First Amendment issue.

We are satisfied after our review of the entire record that defendant's threat to kidnap Doe, both in tone and content, along with his repeated harassment and threats of physical harm to her, reasonably support the jury's determination that defendant made a threat which included substantial bodily harm under section 422.

DISPOSITION

The judgment is affirmed.

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Jenkins, J.

We concur:

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Siggins, P. J.

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Fujisaki, J.